

STEPHEN J. COX
ATTORNEY GENERAL

Christopher F. Orman (Alaska Bar No. 1011099)
Assistant Attorney General
Alaska Department of Law
PO Box 110300
Juneau, AK 99811-0300
Telephone: (907) 465-3600
Facsimile: (907) 465-3019
Email: *christopher.orman@alaska.gov*

Attorney for the State of Alaska

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

METLAKATLA INDIAN COMMUNITY, a
Federally Recognized Indian Tribe,

Plaintiff,

v.

MICHAEL J. DUNLEAVY, Governor of the
State of Alaska,
DOUG VINCENT-LANG, Commissioner of
the Alaska Department of Fish and Game,
and JAMES E. COCKRELL, Commissioner
of the Alaska Department of Public Safety,

Defendants.

Case No.: 5:20-cv-00008-SLG

**DEFENDANT'S JOINT REPLY
BRIEF AND OPPOSITION TO THE
TRIBE'S CROSS-MOTION FOR
SUMMARY JUDGMENT**

**DEFENDANT'S JOINT REPLY BRIEF AND OPPOSITION TO THE TRIBE'S CROSS-
MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ARGUMENT	2
A.	The usual and accustomed fishing right case law should guide this Court’s review of the Tribe’s evidence.	2
B.	The Tribe has no evidence that the Metlakatlangs historically and regularly fished in the open, deep saltwater seas outside of the Annette Islands Reserve up to 1891.	11
C.	In the absence of clear congressional intent, general evidence of fishing practices by Tlingit and Haida in Southeast Alaska should not be imputed to the Tribe.	16
D.	Precontact Tsmishian abandoned Southeast Alaska and later opportunistic fishing on trading voyages by Tsimshian in Southeast Alaska on behalf of the Hudson Bay Company does not establish these were waters that the Tsimshian continuously fished up to 1891.	24
E.	That the Tribe’s members fished in state waters open to commercial fishing years after 1891 does not prove the Metlakatlangs actually fished in those waters up to 1891.	25
F.	The Tribe has brought a case focused on commercial salmon fishing and this Court should not issue any advisory opinions on fisheries that do not present a case or controversy.	28
G.	The Tribe has no evidence proving its case, and yet the “evidence” it presents are unsupported assertions.	31
III.	CONCLUSION.....	36

TABLE OF AUTHORITIES

Cases

<i>Alaska Pacific Fisheries Co. v. U.S.</i> , 248 U.S. 78 (1918)	18
<i>Baley v. U.S.</i> , 942 F.2d 1312 (5th Cir. 2019)	4
<i>Cappaert v. U.S.</i> , 426 U.S. 128 (1976)	4, 8
<i>Colville Confederated Tribes v. Walton</i> , 647 F.2d 42 (9th Cir. 1981)	4, 8
<i>Confederated Tribes of Chehalis Indian Reservation v. State of Washington</i> , 96 F.3d 334 (9th Cir. 1996)	6
<i>Crow Creek Sioux Tribe</i> , 900 F.3d 1350 (9th Cir. 2018)	4, 8
<i>Flast v. Cohen</i> , 392 U.S. 83 (1983)	30, 31
<i>Haaland v. Brackeen</i> , 599 U.S. 255 (2023)	8
<i>In re Solimano Framing Group LLC</i> , 664 B.R. 803 (2024)	36
<i>Lax Kw'alaams Indian Band v. Canada</i> , 2008 BCSC 447, p. 40 (B.C. Supreme Court April 16, 2008)	31, 32
<i>May v. State</i> , Commercial Fisheries Entry Com'n, 168 P.3d 873 (Alaska 2007)	28, 29
<i>Metlakatla Indian Community v. Dunleavy</i> , 58 F.4th 1034 (9th Cir. 2023)	1, 2, 3, 4, 5, 6, 9, 19, 24, 26, 30, 34, 36
<i>Metlakatla Indian Community v. Dunleavy</i> , 736 F.Supp.3d 741 (D. Alaska 2024)	2, 3, 5, 17
<i>Muckleshoot Indian Tribe v. Hall</i> , 698 F.Supp.1504 (W.D. Wash. 1988)	9, 10

<i>Scudero v. State</i> , 496 P.3d 381 (Alaska 2021)	15, 28, 29
<i>Stillaguamish Tribe of Indians v. Washington</i> , 102 F.4th 955 (9th Cir. 2024)	10
<i>Swinomish Indian Tribal Community v. Lummi Nation</i> , 80 F.4th 1056 (9th Cir. 2023)	6
<i>Thomas v. Union Carbide Agr. Prod. Co.</i> , 473 U.S. 568 (1974)	30, 31
<i>Tlingit and Haida Indians of Alaska v. U.S.</i> , 177 F.Supp. 452 (Ct. Cl. 1959)	16, 21, 24, 25, 26
<i>U.S. v. Adair</i> , 723 F.2d 1394 (9th Cir. 1983)	4, 8
<i>U.S. v. Gracia</i> , 77 F.3d 274 (9th Cir. 1996)	36
<i>U.S. v. Lummi Indian Tribe</i> , 235 F.3d 443 (9th Cir. 2000)	9, 10
<i>U.S. v. Oregon</i> , 29 F.3d 481 (9th Cir. 1994)	19, 23
<i>U.S. v. Van Alstyne</i> , 584 F.3d 803 (9th Cir. 2009)	36
<i>U.S. v. Washington</i> , 129 F.Supp.3d 1069 (W.D. Wash. 2015)	9, 10
<i>U.S. v. Washington</i> , 18 F.Supp.3d 1123 (W.D. Wash. 1987)	20
<i>U.S. v. Washington</i> , 18 F.Supp.3d 1172 (W.D. Wash. 1993)	19, 20
<i>U.S. v. Washington</i> , 19 F.Supp.3d 1252 (W.D. Wash. 1999)	6
<i>U.S. v. Washington</i> , 384 F.Supp.312 (W.D. Wash. 1974)	30

<i>U.S. v. Washington</i> , 853 F.3d 946 (9th Cir. 2017)	5
<i>Upper Skagit Indian Tribe v. Suquamish Indian Tribe</i> , 871 F.3d 844 (9th Cir. 2017)	7, 10, 25
<i>Wahkiakum Band of Chinook Indians v. Bateman</i> , 655 F.2d 176 (9th Cir. 1981)	6

Statutes

26 Stat. 1095, 1101 (1891)	18
43 U.S.C. § 1603	19
AS 16.43.140 - .990.....	1
The White Act, 43 Stat. 464 (1924)	27

Other Authorities

5 AAC 29.150.....	1, 14
5 AAC 33.350.....	1, 14

Rules

Alaska CFEC, “Metlakatla: Holdings of Limited Entry Permits, Sablefish Quota Shares, and Halibut Quota Shares Through 1997”	28, 35
Anna Laffrey, “New seafood buyer with big plans starts small in Metlakatla,” Wrangell Sentinel (July 9, 2024).....	35
Congressional Record, 21 Cong. Rec. 10092 (September 16, 1890).....	18
Jefferson Moser, The Salmon and Salmon Fisheries of Alaska, (Washington Gov. Press 1899).....	11, 12, 33, 34
Steven Pennoyer, “Early Management of Alaskan Fisheries,” Alaska Fish and Game 20(2):12-13 (1988)	27

I. INTRODUCTION

The scope of the Metlakatla Indian Community's (Tribe's) implied off-reservation fishing right are the *locations* where the Metlakatlans historically fished up to 1891.

And the *locations* at issue can be narrowed based on the Tribe's requested relief: the waters open to commercial fishing in fishing districts 1 and 2. ECF 40, Claim for Relief. These are open, deep saltwater seas.¹ Exhibits H - P (showing the areas open to commercial fishing in Southeast Alaska waters. The red line and dark blue water denote closed waters).² A commercial fisherman needs a limited entry permit to commercially salmon fish in these open, deep saltwater seas.³

The Tribe has the burden of proving that its "congressionally reserved right to fish" includes these open, deep saltwater seas. ECF 119, ¶ 36. The Tribe must prove that "since time immemorial" they fished in these waters and "continued to fish in [them up to] 1891."⁴

There is no genuine issue of material fact that the Metlakatlans *did not* historically – thus regularly, frequently and continuously – fish in these open, deep saltwater seas.

¹ 5 AAC 33.350 and 5 AAC 29.150.

² The maps marked as Exhibits H - P are derived from ADF&G's Online ArcGIS Map System; available at: <https://experience.arcgis.com/experience/8aa7f0b6b65c4442af3d030d5a58c435/page/Experience?views=Map-Layers> (accessed on January 30, 2026) (the layer "Closed Waters to Salmon Net Fisheries" must be clicked). The same waters closed to salmon net fisheries are also closed to commercial trolling. *Compare* 5 AAC 33.350 and 5 AAC 29.150.

³ AS 16.43.140 - .990.

⁴ *Metlakatla Indian Community v. Dunleavy*, 58 F.4th 1034, 1048 (9th Cir. 2023).

Because they lack the evidence to prove their case, these waters should not be included in the Tribe's implied off-reservation fishing right.

Recognizing their case's shortcomings, the Tribe requests this Court apply a novel and lesser evidentiary standard to review its evidence, attempts to blur the line between Metlakatlan, Tlingit, Haida, and Tsimshian, relies on fishing by Metlakatlans that began in the 1950s, and even misstates the State's expert report.

All of which confirm the Tribe has no evidence.

II. ARGUMENT

A. The usual and accustomed fishing right case law should guide this Court's review of the Tribe's evidence.

In its June 2024 order, this Court held that it “need not determine what rule to apply on remand because the Ninth Circuit has already articulated the rule this Court is to apply. The Ninth Circuit expressly applied the *Winters* framework to determine the Community's implied off-reservation rights.”⁵

Yet the Ninth Circuit – which determined Congress' intent when it created the Annette Islands Reserve in 1891 – never explained *what evidence* would prove whether the waters open to commercial fishing in fishing districts 1 and 2 are “where [the Tribe has] fished since time immemorial and where they continued to fish in 1891 when their reservation was established.”⁶ The Ninth Circuit, evaluating Congress' intent when it

⁵ *Metlakatla Indian Community v. Dunleavy*, 736 F.Supp.3d 741, 755 (D. Alaska 2024).

⁶ *Metlakatla Indian Community*, 58 F.4th at 1048; *Metlakatla Indian Community*, 736 F.Supp.3d at 751 (stating the State mischaracterized the Ninth Circuit holding).

passed the 1891 Act creating the Annette Islands Reserve, held that Congress intended to grant the Tribe a non-exclusive, implied off-reservation fishing right in fishing districts 1 and 2 in places where the Tribe fished since time immemorial and continued to do so when the reserve was created.⁷ The Ninth Circuit remanded for this Court to determine the scope of that fishing right and thus to consider what evidence would prove whether the Tribe's off-reservation fishing right includes the open, deep saltwater seas of fishing districts 1 and 2.

Therefore, the State's question is pragmatic: what evidence does the Tribe have to present to show that it fished at certain locations since time immemorial and continued to do so in 1891? For example, it cannot be the case that a few ancient voyages trolling for halibut for consumptive purposes in Southeast Alaska generally, *see* ECF 123 at 18, is enough to prove the Tribe has commercially fished throughout the saltwater fisheries of all of fishing districts 1 and 2 since time immemorial and continued to do so in 1891.⁸

Complicating this question, the *Winters* Doctrine trial court cases⁹ outline the evidence needed to prove the scope of a *tribe's water allocation*. When a court quantifies the amount of water a tribe needs to fulfill an implied on-reservation water right (i.e., the traditional *Winters* inquiry), it reviews historic stream flows, the amount of practicable

⁷ *Metlakatla Indian Community*, 58 F.4th at 1045.

⁸ *Metlakatla Indian Community*, 736 F.Supp.3d at 755. The State disagrees with the Ninth Circuit and may seek *certiorari* upon final judgment in this case. But the State does not ask this Court to ignore the Ninth Circuit's holding.

⁹ In contrast, the *Winters* Doctrine appellate cases address how courts determine Congress' intent; i.e. whether Congress intended to reserve a water right. *Supra* note 10.

irrigable reservation land, water right priorities (which can require considering the tribe's aboriginal rights over the land and water), and other similar historic evidence.¹⁰ The fact finding in these water allocation cases focuses on an allocation, not a historic fishing *location*.

This Court, in contrast, is tasked with determining a tribe's historic fishing *location*: where the Tribe "fished since time immemorial and . . . continued to fish in 1891 when their reservation was established."¹¹ The Ninth Circuit tasked this Court with factfinding about the *location* and *extent* of the Tribe's historic fishing practices.¹² About location, this Court has to decide whether, where, when, and how much those fishing practices were historically occurring in the waters open to commercial fishing in fishing districts 1 and 2. The Ninth Circuit did not, as this Court previously implied, detail the

¹⁰ *Crow Creek Sioux Tribe*, 900 F.3d 1350, 1352-1353 (9th Cir. 2018); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981); *U.S. v. Adair*, 723 F.2d 1394, fn 7 (9th Cir. 1983); *Cappaert v. U.S.*, 426 U.S. 128, 141 (1976) (the tribe must present evidence of how much water "to fulfill the purpose of the reservation, no more."); and U.S. Amicus Brief, ECF 59 at p. 10-15 (noting the distinction between determining whether Congress intended to grant a reserved right and the evidence a tribe presents to prove the scope of the reserved right.).

¹¹ *Baley v. U.S.*, 942 F.2d 1312, 1338 (5th Cir. 2019) (that the tribe was entitled to water needed for its on-reservation fishery to continue to have sufficient flows for the tribe to continue to undertake its on-reservation fishing); *Cappaert*, 426 U.S. at 131-132 (that the tribe's reserved right included ensuring sufficient water to sustain the pupfish in the reservation's pool); and *Metlakatla Indian Community*, 58 F.4th at 1048.

¹² *Metlakatla Indian Community*, 58 F.4th at 1048.

amount and type of evidence the Tribe needed to present to prove certain locations are included in the Tribe's implied off-reservation fishing right.¹³

Reviewing the panel's decision that Judge Fletcher authored, there are signs that the "usual and accustomed" standards should be used to outline the amount of evidence the Tribe must provide. The decision cites *U.S. v. Washington*, a 2017 *usual and accustomed fishing rights* case decision that Judge Fletcher also authored.¹⁴ In the 2017 *U.S. v. Washington* decision, Judge Fletcher explained how the *Winters* Doctrine could be used to find that the Tribe had an implied right to harvestable fish being available at the Tribe's usual and accustomed fishing locations.¹⁵ Therefore, Judge Fletcher used the *Winters* Doctrine in a usual and accustomed fishing rights case. To be clear, *U.S. v. Washington* does not expressly adopt the usual and accustomed case law to determine the scope of a Tribe's *Winters* Doctrine implied off-reservation fishing right. But the fact Judge Fletcher showed a correlation between the usual and accustomed fishing rights cases and the *Winters* Doctrine should not be ignored.¹⁶

¹³ 736 F.Supp.3d at 751 ("Thus, contrary to the State's assertion that "the Ninth Circuit did not rule on the scope of [the Community] members' off-reservation fishing rights," the Ninth Circuit explicitly "provide[d] the answer" to "[t]he question before [it of] the scope of" the "implied fishing right stemming from the 1891 Act."). The Court appears to have confused the Ninth Circuit's congressional intent finding under the *Winters* Doctrine with the State's pragmatic question about the evidence needed to prove the scope of that reserved right. They are different. *See* ECF 59, p. 10 - 14.

¹⁴ *Metlakatla Indian Community*, 58 F.4th at 1044; *citing* 853 F.3d 946 (9th Cir. 2017).

¹⁵ *U.S. v. Washington*, 853 F.3d at 965.

¹⁶ *Id.*

Consistent with citing *U.S. v. Washington*, the Ninth Circuit’s decision contains language and reasoning that dovetails with the usual and fishing rights cases. The Ninth Circuit held that the Tribe holds “an implied right to non-exclusive off-reservation fishing.”¹⁷ The usual and accustomed fishing rights cases are non-exclusive fishing rights cases; they are not based on aboriginal rights.¹⁸ Multiple tribes can hold a usual and accustomed fishing right to the same location.¹⁹ Aboriginal rights may play a role in allocating rights among tribes competing for the same shared resource.²⁰ But, the scope of a tribe’s off-reservation fishing right in the usual and accustomed fishing rights cases is not defined by whether the tribe held aboriginal rights to a certain location.²¹ Similarly, “regular, frequent, and continuous” seems analogous to the phrases “historic fishing” or “historic practice” that Judge Fletcher used.²² The usual and accustomed fishing rights

¹⁷ 58 F.4th at 1480.

¹⁸ *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176 (9th Cir. 1981) (recognizing that the tribe had the right to fish at all usual and accustomed fishing grounds, even though their aboriginal rights had been extinguished); and *Confederated Tribes of Chehalis Indian Reservation*, 96 F.3d 334.

¹⁹ *Swinomish Indian Tribal Community v. Lummi Nation*, 80 F.4th 1056, 1064 (9th Cir. 2023) (“[T]hat is to say, multiple tribes may, as a purely legal matter, have overlapping usual and accustomed fishing grounds.”).

²⁰ *U.S. v. Washington*, 19 F.Supp.3d 1252, 1281 (W.D. Wash. 1999) (the Tribes’ agreement defines primary rights and differentiates primary from invitee rights.). According to the U.S.’s amicus brief, this would be similar to the role aboriginal rights play in reserved water rights cases. United States’ Amicus Brief, ECF 59, p. 10 - 14.

²¹ *Swinomish Indian Tribal Community*, 80 F.4th at 1064.

²² 58 F.4th at 1043; 1044 (“historical evidence”); and 1046 (“a meaningful interrogation of historical practice”).

cases, especially given they are the only body of off-reservations fishing rights case law, provide appropriate analogues here.

To meet the “usual and accustomed” standard, a tribe must prove “regular and frequent and continuous” use of waters for subsistence purposes, ceremonial purposes, or commercial purposes.²³ Because the burden of proof is “regular and frequent and continuous” use, opportunistic fishing while traveling through certain waters is insufficient evidence to establish a location as part of a tribe’s off-reservation fishing right.²⁴

The Tribe rejects the usual and accustomed fishing rights case law and suggests this Court should apply a lesser evidentiary standard. The Tribe argues that to meet the Ninth Circuit’s standard, all it has to show is that any of its members or any members of Tlingit and Haida who were associated with the Community in 1891 fished anywhere “within Districts 1 and 2.” ECF 134 at 25. And then, the Tribe argues, after taking into account its self-purported “future need,” its members may now “pursue fish” and thus commercially fish throughout fishing districts 1 and 2 without a limited entry permit, even if they have little evidence to prove historic use of those waters. ECF 134 at 25 – 26. They assert that economic “future need” should override its lack of evidence. *Id.*

If the Tribe’s evidentiary standard made sense, then why would courts require tribes to show historic water use, the amount of irrigable acres on a reservation, what

²³ *Upper Skagit Indian Tribe*, 871 F.3d at 846.

²⁴ *Id.*

priority water rights the Tribe held, and a variety of evidence to establish their on-reservation water allocation need? According to the Tribe, such evidence would be unnecessary because the Tribe was entitled to water to “pursue” *whatever it determined* its *present and future* needs were. ECF 134 at 25-26. But this example again highlights the problem with trying to compare a *water right allocation case* – a right calculated in cubic feet – to a case about a historic fishing *location*.

There is an additional problem with the Tribe’s proposed rule, in that it perversely allows it to put on less evidence in establishing the scope of an *implied* fishing right than a tribe must present to establish the scope of an *expressed* fishing right. ECF 134 at 21-25. Put differently, when Congress expressly preserves a tribe’s historic off-reservation fishing locations by including the usual and customary language in a treaty, tribes must show a certain amount of evidence to prove that they historically fished in those locations.²⁵ The Tribe argues it does not need to make a similar showing. ECF 134 at 25-26. Pushing the evidentiary standard so low as the Tribe requests would give courts, rather than Congress, plenary authority to legislate Indian affairs.²⁶

In presenting this lesser evidentiary standard, the Tribe also seeks to convert their off-reservation fishing right case into a salmon allocation case; thus, not making the case

²⁵ *Crow Creek Sioux Tribe*, 900 F.3d at 1352-1353; *Colville Confederated Tribes*, 647 F.2d 42; *Adair*, 723 F.2d 1394, fn 7; *Cappaert*, 426 U.S. at 141; and U.S. Amicus Brief, ECF 59 at p. 10-15.

²⁶ *Haaland v. Brackeen*, 599 U.S. 255, 273 (2023) (“Congress’s power to legislate with respect to the Indian tribes [is] plenary and exclusive.”).

about *locations* but instead about *a right to the fish itself*. The Tribe asserts the *Winters* Doctrine grants them the right to “pursue” fish within fishing districts 1 and 2. ECF 134 at 21. Meaning, the Tribe believes that if it can simply show that the Metlakatlangs have a broad history of fishing and can show economic reliance on salmon, then this Court will find it holds a right *rooted in the fish itself*; thus, never having to prove that its members historically fished at certain *locations*. ECF 134, p. 26.

No law supports the Tribe’s assertion that an off-reservation fishing right is tied to the fish itself. The Ninth Circuit’s decision and the usual and accustomed fishing cases firmly ground the scope of an off-reservation fishing right to specific locations where tribes historically fished.²⁷ No off-reservation fishing right cases suggest that the right is tied *to the fish* and that the Tribe is entitled *to track or pursue the fish* to various locations outside of the locations they historically fished.²⁸ The Tribe would need to file a new complaint if it wants to assert a right or interest in a certain number of fish; thus alleging a right to an allocation of fish from Southeast Alaska’s waters.

To summarize, the “regular, frequent, and continuous” fishing standard should guide this Court’s review of the evidence. Under it, the Tribe must present evidence of regular and frequent fishing throughout all of fishing districts 1 and 2 to be granted their

²⁷ *Metlakatla Indian Community*, 58 F.4th 1034; *U.S. v. Washington*, 129 F.Supp.3d 1069, 1110 (W.D. Wash. 2015); *Muckleshoot Indian Tribe v. Hall*, 698 F.Supp.1504, fn. 6 (W.D. Wash. 1988); *U.S. v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000).

²⁸ *Id.*

requested relief.²⁹ The Tribe has the burden of showing regular, frequent, and continuous fishing in specific locations at the time of 1891.³⁰ A tribe does not meet the burden under this case law if it cannot “demonstrate that it fished the claimed waters before and at treaty time.”³¹ A usual and accustomed fishing ground is not an area that was used “infrequently or at long intervals and extraordinary occasions.”³² Because of this, “[o]ccasional and incidental trolling in marine waters used as thoroughfares for travel does not constitute a usual and accustomed fishing location.”³³ Further, expert testimony that is “too speculative” and that “lack[s] any direct evidence, indirect evidence, nor any reasonable inference of marine fishing activity” in 1891 would also be insufficient.³⁴

Lastly, nothing in this case law suggests if a tribe proves that it frequently fished at a specific river mouth or stream, that they have established a history of fishing throughout all of a state designated fishing district. The off-reservation fishing right would, at most, extend to that river mouth or stream; that *location* where the tribe continuously, frequently, and regularly fished up to the adoption of the 1891 Act.³⁵ This

²⁹ *Upper Skagit Indian Tribe*, 871 F.3d at 846;

³⁰ *U.S. v. Washington*, 129 F.Supp.3d at 1110; *Muckleshoot Indian Tribe*, 698 F.Supp. at fn. 6; *U.S. v. Lummi Indian Tribe*, 235 F.3d 443.

³¹ *Stillaguamish Tribe of Indians*, 102 F.4th 955, 959.

³² *U.S. v. Washington*, 129 F.Supp.3d at 1110; *Muckleshoot Indian Tribe v. Hall*, 698 F.Supp. 1504, fn. 6; *U.S. v. Lummi Indian Tribe*, 235 F.3d 443.

³³ *Id.*

³⁴ *Stillaguamish Tribe of Indians*, 102 F.4th at 959 (9th Cir. 2024).

³⁵ *Stillaguamish Tribe of Indians*, 102 F.4th at 958.

case is about locations, and proving the Tribe fished at a few locations within fishing districts 1 and 2 does not prove historic fishing *throughout all* of fishing districts 1 and 2.

B. The Tribe has no evidence that the Metlakatlangs historically and regularly fished in the open, deep saltwater seas outside of the Annette Islands Reserve up to 1891.

The Tribe lacks evidence that in 1891, Metlakatlangs regularly, frequently and continuously fished in the waters open to commercial fishing in fishing districts 1 and 2.

At best, the Tribe has evidence of regular and frequent salmon harvests *supplied to its cannery* from approximately five historic *freshwater fisheries* in Southeast Alaska after 1891. Relying on Jefferson Moser’s 1899 report, the Tribe presents evidence of salmon harvests supplied to the Metlakatla cannery from the following locations: Moira Sound, Quadra Bay, Home Site, Tamgas, or Karta Bay. ECF 119-2, pg. 2; 10-14; ECF 119-1, ¶ 33 (Dr. Langdon explains the Metlakatlangs commercially harvested salmon “in the late 1880s” in “Quadra Bay, Karta Bay, Kithraum, Peter Johnson, Nowiskay, Old Johnson, Kegan, and Kagahine.”). Home Site and Tamgas refer to Annette Islands fisheries and thus on-reservation fisheries. *Id.* The rest were freshwater fisheries. ECF 119-1, ¶ 33; *see also* ECF 119-2, pg. 2; 10-14.

There are four problems with the Tribe’s reliance on Jefferson Moser’s 1899 Report titled “The Salmon and Salmon Fisheries of Alaska.”³⁶ First, Mr. Moser’s report

³⁶ Jefferson Moser, *The Salmon and Salmon Fisheries of Alaska*, p. 3 and 14 (Washington Gov. Press 1899) (“Moser Report”); available at: <https://ia801301.us.archive.org/20/items/salmonsalmontfish00mose/salmonsalmontfish00mose.pdf> (accessed on January 30, 2026).

was published in 1899 and includes data up to 1896. Moser Report, *generally*.

According to Mr. Moser, the Metlakatla cannery did not start purchasing and packing salmon in earnest until the summer of 1891, thus after Congress created the reservation.

Moser Report, p. 66. Therefore, Mr. Moser's data of salmon harvests from various freshwater fisheries being supplied to the Metlakatla cannery span from 1891 to 1896;

thus, after the creation of the reservation. *Id.* Such evidence does not directly or indirectly prove the Metlaktlans "up to 1891" were fishing at those locations. *Id.*

Second, all of the fisheries Mr. Moser listed as supplying salmon to the Metlakatla cannery were freshwater fisheries; thus, fisheries now closed to commercial salmon

harvests(i.e. Peter Johnson,³⁷ Nowisk-Kay (or Nowiskay)³⁸, Kegan³⁹, Old Johnson⁴⁰

Quadra Bay and Karta Bay.⁴¹). 5 AAC 29.150 and 5 AAC 33.350. Third, because Mr.

Moser details salmon harvests from freshwater fisheries. *Id.* This does not constitute evidence of the Tribe historically, regularly, or continuously fishing in the open, deep sea

waters of fishing districts 1 and 2.

Fourth, and most importantly, Mr. Moser provides evidence that the Metlakatla cannery was being supplied salmon from these freshwater fisheries, not that the

Metlaktlans were actually fishing at these locations. Dr. Langdon relies on Mr. Moser's

³⁷ *Id.* at p. 83.

³⁸ *Id.* at p. 82.

³⁹ *Id.* at p. 78.

⁴⁰ *Id.* at p. 80.

⁴¹ *Id.*

reports and then *infers* from those the reports that the *Metlakatlangs* commercially harvested salmon “in the late 1880s” in “Quadra Bay, Karta Bay, Kithraum, Peter Johnson, Nowiskay, Old Johnson, Kegan, and Kagahine.” ECF 119-1, ¶ 33. But Mr. Moser only reported salmon being supplied to the cannery up to 1896; not that the *Metlakatlangs* – thus those who joined William Duncan’s Christian community – regularly, frequently and continuously fished in these freshwater fisheries. Moser Report, *generally*.

Instead, the historic record contains direct evidence that the *Metlakatlangs* did *not* historically participate in these freshwater fisheries. ECF 95-2, p. 21; 42-43; 51-52. The *Metlakatlangs* faced violence when they fished off-reservation. *Id.* Because of this, William Duncan purchased salmon from Tlingit and Haida that had the right to harvest salmon from these freshwater fisheries for the Annette Island Reserve’s cannery. *Id.* Mr. Moser’s reports actually confirm Duncan’s letters that *Metlakatlangs* were not fishing at these locations, but instead the cannery was *relying on harvests being supplied from these fisheries*. Moser Report, p. 79 – 85. It would be more accurate to infer that the reported salmon being supplied to the *Metlakatla* cannery were those harvests that Duncan contracted for.

The Tribe, wrongly, infers that *Metlakatlangs* must have been fishing at these locations because the cannery owned drag and purse seine nets. ECF 134 (“At that time [i.e. in the 1890s] the Community was using drag and purse seine nets for its commercial salmon harvest.”); *see also* ECF 119 ¶ 33; ECF 119-2. In his 1899 report – thus information culled after Congress created the reservation – Mr. Moser did report that the

Metlakatla cannery owned “9 drag seines” and “2 purse seines.” Moser Report, pg. 56. Using just that information Dr. Langdon *infers* – broadly and without any foundation – that the Metlakatlans themselves were using those nets to participate in off-reservation fishing. ECF 119 ¶ 33 (“By the late 1880’s, drag and purse seines were being used for commercial salmon harvests, including by Metlakatlan fishermen.”). But the historic record suggests a more accurate inference is that Duncan purchased the gear to outfit commercial fishermen that he contracted with to supply salmon to the cannery. *Id.*; ECF 95-2 at 43 fn 83 (noting that Duncan agreed to outfit fishermen he contracted with.). Such a finding would be consistent with the historic record showing the Metlakatlans were not regularly, frequently, or continuously fishing in Southeast Alaska’s fisheries. ECF 95-2 at 21; 42-43; 51-52.

Even if this Court determined that the freshwater fisheries at “Quadra Bay, Karta Bay, Kithraum, Peter Johnson, Nowiskay, Old Johnson, Kegan, and Kagahine” were the Tribe’s historic fishing locations and are included in the Tribe’s off-reservation fishing rights, these waters have been closed to commercial fishing for decades.⁴² Exhibits H - P. The Tribe has not challenged the regulations closing those freshwaters to commercial fishing. ECF 40; *generally*. This means that a decision finding that the Tribe’s off-reservation fishing rights include a few freshwater fisheries would not entitle the Tribe’s

⁴² 5 AAC 33.350 (first adopted in 1982); and 5 AAC 29.150 (first adopted in 1998).

members to engage in commercial fishing in the deep, open, saltwater seas of fishing districts 1 and 2 without a limited entry permit.⁴³

The Tribe tries, though fails, to expand beyond these historic freshwater fishing locations by asserting that Metlakatlangs intertidally fished at these historic freshwater fisheries. ECF 134 at 18 and 20. Dr. Langdon mentions salmon harvests in the intertidal zones at Karta Bay. ECF 119-2 at 9. He fails to provide any evidence directly showing Metlakatlangs (as opposed to non-Metlakatlan Alaska Natives) were harvesting fish from these intertidal waters. *Id.* Regardless, all of Karta Bay is closed to commercial fishing. Exhibits H and J. Dr. Langdon provides no direct evidence of saltwater harvests at Moira Sound, Quadra Bay, or the other historic freshwater fisheries. *Id.* However, large portions of Moira Sound and Quadra Bay are also closed to commercial fishing and it is likely those “intertidal areas” – if the Tribe could prove regular, frequent, and continuous harvests at these saltwater locations – are also closed to commercial fishing. Exhibits I and K – P. Again, the Tribe has not challenged the regulations closing those waters to commercial fishing.

Lastly, the Tribe implies that proving salmon harvests in these four or five historic freshwater fisheries means they have established that they historically and continually fished throughout the waters that comprise all of fishing districts 1 and 2. ECF 134 at 11.

⁴³ See *Scudero v. State*, 496 P.3d 381, 386-88 (Alaska 2021) (citing three U.S. Supreme Court cases supporting its holding that even if the Metlakatla Indian Community has broad off-reservation fishing rights, those rights are subject to state laws, including the limited entry permit program, that are reasonable and necessary conservation measures).

But no case law supports the Tribe's assertion that their off-reservation fishing right includes an entire state management district even if this Court finds that they have provided evidence of historic fishing at a few small locations within that management district. Another way to frame the Tribe's argument would be to consider if the State had subdivided the fishing districts 1 and 2 even further; that it had divided the waters into 20 districts, one of which included the historic freshwater fisheries Dr. Langdon discusses. Evidence of fishing in a single district would not be evidence of fishing within the other 19 districts. Rather, the specific locations would comprise the Tribe's entire off-reservation fishing right, not the State's geographic grouping of fishing districts. Circling back to the legal standard, this is not a water or fish *allocation* case. This is a *location* case; to determine *where* the Tribe continued to historically fish up to 1891. The Tribe cannot prove its case.

C. In the absence of clear congressional intent, general evidence of fishing practices by Tlingit and Haida in Southeast Alaska should not be imputed to the Tribe.

Given the Tribe's lack of evidence of Metlakatlangs historically and continuously fishing in these deep, open, saltwater seas, the Tribe pivots to relying on the Court of Claims' holding that the Tlingit and Haida held aboriginal fishing rights to all of Southeast Alaska's waters.⁴⁴ ECF 134 at 8 – 12. The Tribe implicitly asserts that the rights held by the Tlingit and Haida were transferred to the Metlakatla Community. ECF

⁴⁴ *Tlingit and Haida Indians of Alaska v. U.S.*, 177 F.Supp. 452, 467-468 (Ct. Cl. 1959).

134 at 8-12; 23-28. In making this argument, the Tribe ostensibly relies on this Court's June 2024 order:

Additionally, the Court is unpersuaded by the State's argument that the Community may not rely on any of its members' ancestors who may have held aboriginal rights in the area, such as the Tlingit and Haida Indians, or that the Ninth Circuit "remanded to this Court to determine the scope of the aboriginal rights held by the emigrant Metlakatians in 1891," who had Tsimshian, not Tlingit and Haida, ancestors. . . . Rather, the Ninth Circuit's opinion applies to "the Metlakatlan Indian Community" and where its members had "fished since time immemorial and where they continued to fish in 1891 when their reservation was established." Thus, those members include the Metlakatians who had "emigrated from British Columbia to Alaska, and," up to that point, "such other Alaskan natives as may [have] join[ed] them."⁴⁵

However, the Court's holding, given the Tribe's lack of evidence, raises a series of questions. Doesn't this Court need to consider Congress' intent in 1890 - 1891 when it created the Annette Islands Reserve to determine whether Congress intended to preserve Tlingit and Haida rights held by members and thus conferred those rights to the entire Community? That Congress mentioned "Alaska natives as may join" certainly is not dispositive of Congress' intent? Next, what evidence will this Court consider in determining to what extent the Tlingit and Haida's fishing rights were conferred to the entire Metlakatla community?

On the first question, nothing in the record suggests Congress intended to preserve Tlingit and Haida rights. In 1890, Congress created the Annette Islands Reserve to

⁴⁵ 736 F.Supp.3d at 753-754.

ensure William Duncan’s missionary work could continue in Southeast Alaska.⁴⁶

Congress’ goal was to preserve and protect the Christian Tsimshian immigrants from Canada and to give them a home.⁴⁷ None of the senators debating creation of the Annette Islands Reserve ever mention doing so to preserve and protect Tlingit and Haida rights.⁴⁸ The record also does not show Congress suggesting that the Metlakatlangs held due to Tlingit and Haida membership.⁴⁹ That the 1891 Act included language about Alaska natives joining the Community – just like it also recognized non-Natives as members of the Community⁵⁰ – reflected the missionary nature of the Community and is not proof Congress intended to preserve Tlingit and Haida rights.⁵¹ Supporting this point, there is

⁴⁶ *Alaska Pacific Fisheries Co. v. U.S.*, 248 U.S. 78, 88 (1918) (“The purpose of creating the reservation was to encourage, assist and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life. *True, the Metlakahtlans were foreign born, but the action of Congress has made that immaterial here.*”).

⁴⁷ *Id.*

⁴⁸ Congressional Record, 21 Cong. Rec. 10092 (September 16, 1890); available at: <https://www.congress.gov/bound-congressional-record/1890/09/16/senate-section> (accessed on February 6, 2026).

⁴⁹ *Id.*

⁵⁰ The 1891 Act states, “That until otherwise provided by law the body of lands known as Annette Islands . . . set apart as a reservation for the use of the Metlakatla Indians, and those people known as Metlakahtlans who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them.” 26 Stat. 1095, 1101, (March 11, 1891). The only reason Congress would have differentiated “Metlakatla Indians,” “Alaska natives,” and “people known as Metlakatlangs” was to ensure that non-Indian missionaries were also welcome on the Annette Islands Reserve; as those non-Indians would have been “people known as Metlakatlangs.”

⁵¹ It would be ugly to think that Congress negotiated with the Tlingit and Haida to extinguish their aboriginal rights under ANCSA, but that during those negotiations

no evidence that the Tlingit and Haida thought that Congress was preserving their rights under the 1891 Act.⁵²

Consistent with the above, the Ninth Circuit's decision focused on the Tsimshian and the Coastal Tsimshian as Metlakatlans.⁵³ The Ninth Circuit did not address rights held by the Tlingit and Haida.⁵⁴ The Ninth Circuit did not find that Congress intended to preserve Tlingit and Haida rights or that the Tlingit and Haida rights were transferred to the Metlakatlans.⁵⁵ Nothing in the Ninth Circuit's decision suggests Congress intended to broadly transfer or preserve Tlingit and Haida rights to the Tribe because Tlingit and Haida had joined the Community.⁵⁶ This Court would be expanding the Ninth Circuit's congressional intent determination if it found Congress intended to preserve Tlingit and Haida rights under the 1891 Act.

Ignoring the absence of congressional intent and moving on to the second question, the Tribe's arguments are based on the legal theories of consolidation and merger.⁵⁷ In consolidation or merger cases, a tribe will assert that it holds the same

Congress had no inkling that the 1891 Act would preserve those rights through the Metlakatla Indian Community. 43 U.S.C. § 1603.

⁵² *Metlakatla Indian Community*, 58 F.4th at 1037-1038 (Historical background focuses on the Tsimshian; it never once mentions the Tlingit or Haida).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Metlakatla Indian Community*, 58 F.4th at 1045, 1048.

⁵⁶ *Id.*

⁵⁷ *U.S. v. Oregon*, 29 F.3d 481, 484 – 485 (9th Cir. 1994); *See also U.S. v. Washington*, 18 F.Supp.3d 1172, 1189 (W.D. Wash. 1993) (“There is no evidence to suggest that the tribes that were parties to the Stevens treaties understood the treaties to provide for the

fishing rights as another tribe based on shared ancestry.⁵⁸ A court will then look to “all indicia of tribal relationship to assess whether there has been a consolidation or merger of the tribes, or cohesive bands thereof, sufficient to combine their tribal or political structures.”⁵⁹ Evidence that a tribe had some members of another tribe or that the two tribes share a common ancestry would ostensibly be insufficient.⁶⁰

For its merger or consolidation argument, the Tribe relies on two theories: Tlingit and Haida joined Metlakatla and there was intermarriage between Tsimshian, Tlingit, and Haida. Both theories fail.

On the first, the Tribe asserts that because ten percent of the Community in 1891 was Tlingit and Haida and the Tlingit, Haida, and Tsimshian share a common lineage, that the fishing rights and practices – and aboriginal fishing rights -- *held by all of the Tlingit and Haida families and clans to all of Southeast Alaska’s fisheries* can be imputed to the entire Tribe. ECF 134 at 8 – 12; ECF 119 ¶¶ 40-41 (citing to census data). If correct, the Tribe’s off-reservation fishing rights would include all the fishing grounds where all of the Tlingit and Haida families and clans both historically and in 1891 fished; thus, the broad judicially-confirmed aboriginal rights of all of the Tlingit and Haida

sharing or transfer of the fishing rights among the tribes party to the treaties. Similarly, there is no evidence to suggest that the United States or the tribes party to the Treaty with the Quinault understood it to provide for the transfer or sharing of fishing rights reserved by the tribal parties with tribes not party to the Treaty.”).

⁵⁸ *U.S. v. Oregon*, 29 F.3d 481, 484 – 485 (9th Cir. 1994); *See also U.S. v. Washington*, 18 F.Supp.3d 1172, 1189 (W.D. Wash. 1993).

⁵⁹ *U.S. v. Washington*, 18 F.Supp.3d 1123, 1150 (W.D. Wash. 1987).

⁶⁰ *Id.*

people.⁶¹ These would be deemed the fishing rights Congress implicitly reserved for the *entire* Tribe.

But Tlingit and Haida's recent declarations factually undermine the Tribe's attempts to consolidate or merge those rights into the Metlakatlans' rights. ECF 98, 99, 101, 102, 104, and 105. Those declarations confirm that there was no merger between the Metlakatlans and the Tlingit and Haida as it related to fishing grounds; and that there was no merger between the Tsimshian, Tlingit, and Haida as to fishing grounds. *Id.* They were distinct Tribes by 1891. Dr. Barbara Lane's Affidavit (January 17, 1976), ECF 119-4 at 4-6, 17-21. Tlingit and Haida clans controlled Southeast Alaska fishing grounds and retained control over these fishing grounds even with Tlingit and Haida joining the Metlakatla Community; that Metlakatlans always needed permission to fish in these locations. ECF 97, ¶ 15 ("At that time that the Tsimshian came to Alaska in 1887, they understood our traditional law. Our traditional law would not need to be explained. *Whether one was Tlingit, Haida, or Tsimshian, all people understood that proper protocol required a clan's permission to use that clan's resources.*"); ¶ 20 ("The Metlakatla Indian Community knows now what they knew then – *that their Community members cannot fish on the fishing grounds of the Tlingit and Haida clans as a matter of right.*"); and ECF 99, ¶ 6 ("Our people have never accepted that [the Metlakatlans] hold fishing rights in our territories. In fact, it goes against our traditions to try and take *another people's fish.*").

⁶¹ *Tlingit and Haida Indians*, 177 F.Supp. at 467-468.

The historic record comports with the Tlingit and Haida declarations by confirming that Tlingit and Haida membership did not result in the Metlakatlans being welcome to fish in Southeast Alaska's waters. Duncan wrote letters to federal officials complaining about Metlakatlans facing violence at Southeast Alaska's freshwater fisheries. ECF 95-2 at 21; 42-43; 51-52. To ensure the cannery could operate, Duncan purchased salmon (from non-Metlakatlans) for the Annette Island Reserve's cannery. ECF 95-2 at 11 ("purchased from Haida and Tlingit fishermen."). As Dr. Barbara Lane noted, the Metlakatlans were a separate sovereign and there is no evidence that they were welcome and accepted in Tlingit and Haida controlled fishing grounds simply because Tlingit and Haida had joined the Community. Lane Aff., ECF 119-4 at 4-6, 17-21 (discussing the sovereignty of the Metlakatlans – and showing a through line from Tsimshian to the Metlakatlans – but not mentioning Tlingit and Haida to support her sovereignty determination.).

Which is why the Metlakatlans returned to the Nass and Skeena River into the twentieth century to harvest salmon. ECF 95-2 at 9 (noting the Metlakatlans caught and traded eulachon and salmon harvested from the Nass and Skeena Rivers); 11 (The Metlakatlans "returned regularly and over time to their traditional fisheries on the Nass and Skeena Rivers."); 17 ("Tsimshians, and especially those who would ultimately form the core of the Metlakatlan community in British Columbia, were indeed 'people inside the Skeena River.'"); 69 ("Travel to their traditional fishing territory and stations on the Nass and Skeena Rivers was important for Metlakatlans *well into the twentieth century.*")

Emphasis added.); 76-77; 79 (“Any fishing done beyond the Annette Islands at the time was engaged by those who had traveled back to their traditional fishing stations on the Nass and Skeena Rivers in British Columbia.”); and 82; *see also* Lane Aff, p. 4 – 6, ECF 119-4 (noting the Metlakatlangs’ connection to the Nass and Skeena Rivers.). The Metlakatlangs returned to British Columbia because those were the waters that they had historically, regularly, frequently, and continuously fished up to 1891.

On the second theory, the Tribe’s evidence of intermarriage between the Tsimshian, Tlingit, and Haida also fails to prove a theory of consolidation or merger. ECF 134 at 16. Again, the Tribe has no evidence showing that the *Metlakatlangs* – thus those who joined William Duncan’s community – were welcome to fish throughout Southeast Alaska’s waters because of intermarriage. Broad assertions about intermarriage does not prove the rights held by the Tsimshian, the Tlingit, or the Haida merged with the Metlakatlangs because of marriage.⁶²

To conclude, the historic record fails to show that Tlingit and Haida membership in the Community meant *that the Metlakatlangs* as a Community were welcome to fish in Southeast Alaska’s waters.

⁶² *U.S. v. Oregon*, 29 F.3d at 484 – 485.

D. Precontact Tsimshian abandoned Southeast Alaska and later opportunistic fishing on trading voyages by Tsimshian in Southeast Alaska on behalf of the Hudson Bay Company does not establish these were waters that the Tsimshian continuously fished up to 1891.

The Tribe also cannot rely on the locations where precontact Tsimshian fished because the Tsimshian abandoned Southeast Alaska, meaning they did not “continue to fish [there] in 1891.”⁶³

Dr. Langdon states that the Tsimshian had a historic connection to Southeast Alaska’s fisheries. Dr. Langdon Deposition (March 2025); Ex. Q, Deposition at 181 – 183. But he also admits that the Tsimshian vacated the area and relocated to British Columbia. *Id.* This makes sense because the Tsimshian, by name and under the historic record have a historic connection to the Nass and Skeena River. ECF 95-2 at 14 – 17 (history of the Coastal Tsimshian.). Dr. Langdon’s statements and the historic record corresponds with the Court of Claims’ holding that the Tlingit and Haida had control over Southeast Alaska’s fisheries.⁶⁴ If the Tsimshian continued to have a connection to Southeast Alaska’s fisheries and waters, the Court of Claims’ order would have found that the Tlingit and Haida’s control over those Southeast Alaska fisheries was qualified by the Tsmishian’s fishing rights.⁶⁵ This history is also consistent with the recent Tlingit and Haida member declarations. *See also* ECF 98, 99, 101, 102, 104, and 105.

⁶³ *Metlakatla Indian Community*, 58 F.4th at 1048.

⁶⁴ *Tlingit and Haida Indians*, 177 F.Supp. at 467-468.

⁶⁵ *Id.* The Court of Claims’ map included with the decision recognizes the waters the Tsimshian had control over and thus those waters were not deemed Tlingit and Haida waters. 177 F.Supp. at 469. However, even if the Tsimshian were trolling in those

Even if this Court ignored that the Tsimshian abandoned Southeast Alaska, evidence of the Tsimshian subsistence fishing while travelling in Southeast Alaska waters constitutes opportunistic evidence that fails to establish “regular, frequent and continuous” fishing in those waters. ECF 119-1 ¶¶ 25, 64 (“...fishing for subsistence during their trade journeys”), 65 (“While engaged in trade voyages . . . Tsimshian would fish for subsistence.”).⁶⁶ When the Tsimshian traveled in Southeast Alaska’s waters— on behalf of Hudson Bay Company – it did so in what were then Tlingit and Haida waters.⁶⁷ ECF 119-1 at 33; ECF 95-2 at 81; *see also* Lane Aff., ECF 119-4 (noting the Tsimshian worked for Hudson Bay Company, and the company was connected to British Columbia and had operations on the Nass and Skeena River – not Southeast Alaska.). Courts have held that evidence of opportunistic fishing in certain waters is insufficient to include those waters within a tribe’s off-reservation fishing right.⁶⁸ The same should apply here.

E. That the Tribe’s members fished in state waters open to commercial fishing years after 1891 does not prove the Metlakatlangs actually fished in those waters up to 1891.

The Tribe asserts that the Community’s fishing after 1891—especially decades after 1891—constitutes historic fishing that confirms the scope of their off-reservation

waters, such opportunistic fishing would not satisfy the usual and accustomed fishing rights evidentiary standards.

⁶⁶ *Upper Skagit Indian Tribe*, 871 F.3d at 846.

⁶⁷ *Tlingit and Haida Indians of Alaska*, 177 F.Supp. at 467-468.

⁶⁸ *Upper Skagit Indian Tribe*, 871 F.3d at 846. About the Tsimshian’s trading voyages throughout Southeast Alaska, there is no evidence suggesting the Tsimshian were trading fish harvested from fishing districts 1 and 2. Instead, the Tsimshian apparently traded eulachon and eulachon oil harvested from the Nass and Skeena River. ECF 95-2, p. 5.

fishing right. ECF 134 at 20. The Tribe points to purported fishing logs from the 1950s, ECF 40, ¶ 381 (alleging Metlakatlan fishing logs from the 1950s); a map created of fish landings through 1930, ECF 134 at 20 (referencing a “map” of landings that allegedly show commercial harvests from 1890 up to 1930 through all of Southeast Alaska.); and photos of the Tribe’s members fishing from the 1960s and 1970s, ECF 119-1 at 18 – 19 (photos from the 1960s or 1970s of eulachon harvests by Metlakatlans in the Unuk River).

But the Ninth Circuit directed this Court to review the Tribe’s evidence to determine “the areas where [the Tribe has] fished since time immemorial *and where they continued to fish in 1891 when their reservation was established.*”⁶⁹ This does not suggest that the Tribe’s fishing right can be comprised of fishing that stopped in the 1700s when the Tsimshian abandoned Southeast Alaska.⁷⁰ Ex. Q p. 181 - 183; ECF 98, 99, 101, 102, 104, and 105 (Tlingit and Haida declarations). Nor can it be comprised of fishing that started in the 1940s. ECF 119-1 at 18 – 19 (photos included in Dr. Langdon’s report showing eulachon harvests by Metlakatlans on the Unuk River in the 1960s). The Tribe must present evidence of regular, frequent, and *continuous* fishing up to 1891. Without repeating the above record again here, the historic record confirms the Metlakatlans did not regularly, frequently, or continuously fish in Southeast Alaska’s waters up to 1891. ECF 95-2 at 21; 42-43; 51-52, 76-79; ECF 98, 99, 101, 102, 104, and 105.

⁶⁹ *Metlakatla Indian Community*, 58 F.4th at 1048; *emphasis added*.

⁷⁰ *Tlingit and Haida Indians of Alaska*, 177 F.Supp. at 467-468.

If the Court finds that the tribal members' post-1891 fishing is relevant, then it must also find relevant that such fishing was subject to federal and state regulations where the Metlakatlangs held no advantage over any other commercial fishermen. The historic record confirms that Metlakatlangs fishing off-reservation after 1891 were always subject to federal and state law.⁷¹ When the Tribe engaged in commercial fishing outside its reservation, it was required to comply with the same laws that applied to all other commercial fishermen.⁷² In these off-reservation fishing grounds, the Metlakatlangs engaged in a non-exclusive fishery where Metlakatlangs held no advantage.⁷³ The federal government or the state had control of those waters and thus dictated the terms for those who participated in those fisheries.⁷⁴ To grant the Tribe's requested relief and exempt them from complying with the State's limited entry permit program would be to ignore that their participation in these fisheries was subject to federal and state conditions and restrictions.

The history also confirms that the Metlakatlangs that did participate in state fisheries—this is well after 1891—were awarded limited entry permits, just like other

⁷¹ *E.g.* The White Act, 43 Stat. 464 (1924) (which contained no exceptions for the Metlakatlangs); *see also* Steven Pennoyer, "Early Management of Alaskan Fisheries," Alaska Fish and Game 20(2):12-13, p. 29-30 (1988); available at: <https://spo.nmfs.noaa.gov/sites/default/files/pdf-content/mfr50433.pdf> (accessed on January 21, 2026).

⁷² *Id.* *See also* Moser Report, p. 40 (Duncan acknowledged that "his Indians do not fish during the closed season on account of the law.").

⁷³ *Id.*

⁷⁴ *Id.*

commercial fishermen.⁷⁵ Some Metlakatlangs did not qualify for a limited entry permit, just like other commercial fishermen did not qualify for permits.⁷⁶ The Tribe's members that did receive those permits had the same rights as all other commercial fishermen, and thus could retain or sell their limited entry permits.⁷⁷ To grant the Tribe's requested relief would be to depart from the conditions and restrictions that were in place when their members participated in these commercial fisheries. It would be affording Metlakatlangs a benefit that no commercial fishermen that historically participated in these fisheries has ever received. This would be breaking from the historic conditions and traditions in place when the Metlakatlangs participated in these non-exclusive, commercial fisheries.

F. The Tribe has brought a case focused on commercial salmon fishing and this Court should not issue any advisory opinions on fisheries that do not present a case or controversy.

In its opening brief, when the State explained this case is about salmon, it did so to highlight a ripeness problem. ECF 95.

The Tribe challenges the validity of the limited entry permit program and assert its members have the right to commercially fish for salmon throughout fishing districts 1 and 2. In their complaint, the Tribe mentions halibut fishing, herring fishing, and

⁷⁵ Alaska CFEC, "Metlakatla: Holdings of Limited Entry Permits, Sablefish Quota Shares, and Halibut Quota Shares Through 1997," p. 4 (Available at: <https://www.cfec.state.ak.us/RESEARCH/coast98/METLAKAT.PDF> (accessed on January 28, 2026)). The report shows that Metlakatlangs received over 96 limited entry permits. *Id.*

⁷⁶ *May v. State, Commercial Fisheries Entry Com'n*, 168 P.3d 873 (Alaska 2007); and *Scudero v. State*, 496 P.3d 381 (Alaska 2021).

⁷⁷ *Supra* fn. 75.

subsistence fishing. ECF 40, ¶¶ 3 (subsistence fishing); 18 (subsistence fishing); 26 (subsistence fishing in the context of interpreting the 1891 Act); 35 (“fishing for commercial, subsistence, and cultural reasons.”); 41 (herring, halibut, rockfish, and cod and subsistence and commercial fishing); 45 (herring), 46 (halibut fishing for subsistence purposes); and 47 (subsistence fishing). Shellfish and dive fisheries are not mentioned. ECF 40, generally. But the Tribe includes no allegations that the State has adopted regulations that affect the Tribe’s ability: (1) to subsistence fish; (2) to commercially harvest halibut; (3) to ceremonially fish; or (4) to participate in other commercial fisheries including geoduck or shellfish. ECF 40, Claim for Relief, ¶ 59.

The State’s only alleged wrongdoing has been requiring Metlakatlangs to hold a valid limited entry permit when they commercially harvest salmon in the waters open to commercial fishing in fishing districts 1 and 2.⁷⁸ ECF 40, ¶¶ 23; 28; 30 (as to the cannery); 37; 38b – 1; 41; 43-44. The Tribe asserts the limited entry program has made the reservation fishery a “cage.” ECF 40, ¶¶ 1; 15; 39; 49 -51; 52 (“Community fishermen were unable to participate in the State of Alaska’s program because most Community fisherman [sic] did not qualify for limited entry permits.”); and 55 (“While the Exclusive Fishing Zone was created to protect the Community, it has instead become a cage that threatens the ability of the Community to sustain itself.”). ECF 40, ¶¶ 41 – 55 (“The Community fishermens’ [sic] lack of flexibility to respond to the changes in

⁷⁸ *May v. State, Commercial Fisheries Entry Com’n*, 168 P.3d 873 (Alaska 2007); and *Scudero v. State*, 496 P.3d 381 (Alaska 2021).

salmon migratory patterns, influenced in part by climate change, has significantly disadvantaged the Community.”). Not a surprise that the Ninth Circuit’s decision also focused on salmon harvests and the limited entry permit program as a source of alleged harm.⁷⁹

Because the Tribe has not raised a case or controversy that the State is affecting the Tribe’s ability to harvest halibut or harvest herring or to engage in subsistence or ceremonial fishing in Southeast Alaska waters, there is simply no controversy about those other fisheries.⁸⁰ This Court would be issuing advisory opinions about subsistence and ceremonial fishing or halibut fishing or herring fishing because the Tribe has not alleged that the State has undertaken conduct that affects the Tribe’s alleged off-reservation fishing right in those other fisheries.⁸¹ For some fisheries, like halibut, the federal government and the International Pacific Halibut Commissioner regulate those fisheries and are not named.⁸² The federal government is not a defendant in this litigation and is a

⁷⁹ 58 F.4th at 1037-1041, 1043 (mentioning salmon harvests and salmon approximately 20 times); 58 F.4th at 1037, 1041, 1047 (mentioning the limited entry permit program).

⁸⁰ “A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated or indeed may not occur at all.” *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 580-581 (1974). A court should not hear unripe claims and thus issue advisory opinions. *Flast v. Cohen*, 392 U.S. 83, 94 -96 (1983).

⁸¹ *Compare to U.S. v. State of Wash.*, 384 F.Supp.312, 327-328 (W.D. Wash. 1974) (The U.S. asserted that the State of Washington had undertaken various practices – like “logging . . . industrial pollution and obstruction of treaty fishing streams” that undermined the Tribe’s fishing rights.).

⁸² *E.g.* International Pacific Halibut Commission Fishery Regulations 2025; available at: <https://www.iphc.int/uploads/2025/02/IPHC-Fishery-Regulations-2025-5-Feb-2025.pdf> (accessed on January 29, 2026).

necessary party as to halibut management.⁸³ Because there is no case or controversy and no alleged harm in regard to those other fisheries mentioned above, this Court should not issue an order addressing them.⁸⁴

G. The Tribe has no evidence proving its case, and yet the “evidence” it presents are unsupported assertions.

There is no genuine issue of material fact that the Tribe cannot prove its case and that summary judgment for the State is appropriate. But a closer look at what the Tribe identifies as “undisputed facts” only further shows their case’s flaws. ECF 134, p. 6-8, 10-13, 18-19, 21, 23, 30 (Almost nineteen times, the Tribe asserts that it presents “undisputed” facts.). These self-identified “undisputed facts” are assertions that are unsupported or contradicted by the historic record, misstate expert reports, or even mischaracterize their members’ declarations.

The problems with the Tribe’s “undisputed facts” start with Dr. Langdon’s tendency to make broad, unfounded inferences; a problem recognized by a prior court reviewing a fishing rights issue. In 2008, litigants before the B.C. Supreme Court raised concerns that Dr. Langdon’s testimony, “*was prepared to reach broad based and far-reaching conclusions on the strength of three or four oral narratives.*”⁸⁵ The Court

⁸³ *Id.*

⁸⁴ *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 580-581 (1974) (“A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated or indeed may not occur at all.”); and *Flast v. Cohen*, 392 U.S. 83, 94 -96 (1983).

⁸⁵ *Lax Kw’alaams Indian Band v. Canada*, 2008 BCSC 447, p. 40 (B.C. Supreme Court April 16, 2008).

acknowledged this concern and stated that “Dr. Langdon has a tendency to reach conclusions based on insufficient and inappropriate evidence, *and to speculate* with regard to the pre-contact Coast Tsimshian economy.”⁸⁶

Dr. Langdon repeats that approach here. There are numerous examples, but the most pertinent is when Dr. Langdon broadly claims that “About two-thirds of the salmon came from the four Moira Sound salmon streams owned and fished by the Tongass Tlingit families who were members of the Metlakatla Community.” ECF 119, ¶ 34. Dr. Langdon provides no evidence to support the inference that all of those streams were being “fished by the Tongass Tlingit families who were members of the Metlakatla Community.” ECF 119, ¶¶ 40-41. At best he has evidence of a connection of one Tlingit family – Kegan – that joined the community and had fishing grounds at Kegan Creek. ECF 119-2 at 5. There is evidence that after 1891, three streams – Kegan Creek, Old Johnson, and Peter Johnson – were exclusively contracted to provide salmon to the Metlakatla cannery.⁸⁷ But that is not evidence that Metlaktatlans were harvesting those salmon. After all, most Metlaktatlans returned to the Nass and Skeena River. ECF 95-2 at 69; and 79 (“Any fishing done beyond the Annette Islands at the time was engaged by those who had traveled back to their traditional fishing stations on the Nass and Skeena Rivers in British Columbia.”).

⁸⁶ *Id.* at p. 39.

⁸⁷ Moser Report, p. 79 (Kegan); 80 (Old Johnson); and 83 (Peter Johnson).

In the same paragraph citing Dr. Langdon’s broad assertion, the Tribe then presents an entirely inaccurate interpretation of the State’s expert report. The Tribe asserts that “Even the State’s *expert concedes* that Metlakatlan fishermen at that time fished on the east side of Prince of Wales Island.” ECF 134 at 20; *emphasis added*. This is wrong. Dr. Gulig states, “The original proprietors – the owners of the rights to the stations at Karta Bay were Haidas. Fishing the east side of Prince of Wales Island, even gathering the fish caught there *by Haida or Tlingit fishermen*, was not a tradition or a right held by the Metlakatlans, *but rather it was a purchased privilege* offered to the Metlakatlan fishermen.” ECF 95-2 at 47-48; *emphasis added*.

There is also in this same paragraph the Tribe’s “map” it cites to – which it included with its 2020 complaint ECF 1 and 20 – that has numerous foundation problems. The Tribe asserts this map contains “research *conducted by the Community* [which] shows that their commercial landings between 1890 and 1930 were distributed throughout Southeast Alaska.” ECF 134 at 20. Assuming the “research” comes from the 1899 Moser Reports – Mr. Lundberg’s declaration provides no clarity here (ECF 135 (stating the data comes from “the late 1800s and early 1900s”) – those reports identify salmon harvested from these freshwater fisheries being supplied to the Metlakatla cannery. Moser Report, at p. 80 - 85. That does not prove the Metlakatlans harvested fish at those locations. Further, the Tribe’s map does not differentiate if the landing locations were cited in the 1899 reports or 1930s reports; an important distinction because if the landings were reported for the first time at certain locations in the 1930 reports, then it

cannot be said those are locations where the Metlakatlangs were fishing “in 1891 when their reservation was established.”⁸⁸ Lastly, the Tribe’s map identifies the freshwater locations broadly by placing numbers in the saltwater. Moser Report, at p. 80 - 85. A layperson would, wrongly, assume that salmon were being harvested in those saltwater locations.

The Tribe also presents “facts” that misstate their own members’ declarations. The Tribe asserts:

Many of the species that the Community pursued – such as salmon and herring – are migratory and to successfully prosecute these fisheries, the fishermen had to go where the fish were. The Community fishermen *traditionally* did just that; they did not limit themselves to the water surrounding the Reserve. ECF 134 at 21.

To support this “fact,” the Tribe cites to five declarations prepared by Metlakatla community members. ECF 134 at 21. But these declarations all discuss fishing long after 1891 and provide no history – or tradition – *of the Metlakatlangs* historically fishing in Southeast Alaska’s waters up to 1891. Tradition in this case, as directed by the Ninth Circuit’s remand, focuses on fishing that occurred up to 1891; not what started in the 1950s and continued through the 1970s. Edward Gunyah declares “After the start of the State’s limited entry program” that “the volume of fish on the Annette Islands Reserve was not sufficient.” ECF 114, ¶ 8. Mr. Gunyah’s declaration is discussing fishing in the 1960s, and not even an oral tradition or history of Metlakatlangs fishing up to 1891. *Id.*

⁸⁸ *Metlakatla Indian Community*, 58 F.4th at 1048; *emphasis added*.

Similarly, Albert Smith's declares "When I was fishing with my grandpa Bert . . . he would tell me where he fished in the early days from around the 1930s through the 1970s." ECF 117, ¶ 18. Again, Mr. Smith's declaration does not provide evidence of a pre-1891 tradition of Metlakatlan fishing.

The above highlights factual flailing from just two pages of the Tribe's brief. More could be included. There are sections where the Tribe makes sweeping unfounded assertions about the limited entry permit program closing their cannery⁸⁹ and where they refuse to candidly admit that the Tribe's members *were awarded limited entry permits*.⁹⁰ The State incorporates by reference its comprehensive answer where it addressed most of the Tribe's "facts." ECF 41 (The Ninth Circuit did not have the benefit of the State's answer.).

Given the Tribe's lack of evidence, this Court should not use the law of the case doctrine to grant the Tribe's requested relief. ECF 134 at 19 (telegraphing this, the Tribe

⁸⁹ The Tribe states, "As a direct result of the limited entry system, the Community has been unable to maintain its previous harvest levels, and the [cannery] was forced to close." ECF 134, p. 22. But the Tribe's cannery historically packed salmon *purchased* from non-Metlakatlan commercial fishermen and could still do so today. ECF 95-2, p. 42; *see* Anna Laffrey, "New seafood buyer with big plans starts small in Metlakatla," Wrangell Sentinel (July 9, 2024); available at: <https://www.wrangellsentinel.com/stories/new-seafood-buyer-with-big-plans-starts-small-in-metlakatla,20787> (accessed on February 5, 2026).

⁹⁰ The Tribe asserts that "Community fishermen were unable to participate in the State of Alaska's [limited entry permit] program." ECF 40, ¶ 52. Metlakatlans did qualify for limited entry permits and were awarded limited entry permits. Alaska CFEC, "Metlakatla: Holdings of Limited Entry Permits, Sablefish Quota Shares, and Halibut Quota Shares Through 1997," p. 4. It would be wrong to suggest that no Metlakatlans ever received limited entry permits.

cites facts from the Ninth Circuit’s decision.). In reviewing a Rule 12(b)(6) motion and accepting all of the Tribe’s allegations as true, the Ninth Circuit did state that the Metlakatlangs “[b]efore the arrival of European settlers, [] fished throughout the waters of Southeast Alaska for ceremonial purposes, for personal consumption, and for trade.”⁹¹ But the law of the case doctrine is “not an inexorable command.”⁹² It should not be applied when “its enforcement would work a manifest injustice,” such as here when a litigant cannot prove their case.⁹³

III. CONCLUSION

This motion practice asks: Is evidence of salmon harvests from a few Southeast Alaska freshwater fisheries being supplied to the Tribe’s cannery prior to 1891, evidence of occasional opportunistic fishing by the Tsimshian on trading voyages in Southeast Alaska waters, and evidence that eighty Tlingit and Haida – who collectively as a tribe held aboriginal rights to all of Southeast Alaska’s waters – had joined the Tribe enough to prove that the Metlakatlangs “fished since time immemorial and . . . they continued to fish in 1891 when their reservation was established” in the open, deep, saltwater seas in fishing districts 1 and 2?⁹⁴

⁹¹ *Metlakatla Indian Community*, 58 F.4th at 1044.

⁹² *U.S. v. Van Alstyne*, 584 F.3d 803, 813 (9th Cir. 2009).

⁹³ *U.S. v. Gracia*, 77 F.3d 274, 276 (9th Cir. 1996); *see also In re Solimano Framing Group LLC*, 664 B.R. 803 (2024).

⁹⁴ *Metlakatla Indian Community*, 58 F.4th at 1048.

The answer should be no. For the reasons provided in the State's briefing on this issue, the State's motion for summary judgment should be granted and the Tribe's motion denied.

DATED: February 12, 2026.

STEPHEN J. COX
ATTORNEY GENERAL

By: /s/ Christopher F. Orman
Christopher F. Orman
Assistant Attorney General
Alaska Bar No. 1011099
Email: christopher.orman@alaska.gov
Attorney for the Defendants

CERTIFICATE OF WORD COUNT

Consistent with Local Civil Rule 7.4(a), I certify that this document (a joint opposition and reply brief) complies with the court-ordered word count limit because it contains 9,908 words.

/s/ Christopher F. Orman
Christopher F. Orman
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2026, I electronically filed the foregoing by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Christopher F. Orman
Christopher F. Orman
Assistant Attorney General